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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 489

UTAH PIE COMPANY,
Petitioner,
vs.
CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

Each of the respondents in this case has filed a brief in opposition to petitioner's petition for a writ of certiorari. Petitioner submits this reply brief not for the purpose of reiterating the reasons for granting the writ given in the petition, but rather to dispel several false

notions raised in respondents' briefs, and to point out that respondents themselves have raised issues which, properly considered, would seem to require the granting of the writ, rather than its denial.

Each of the respondents makes the following points:

1. That its sales below cost were not below "direct cost", or if they were, were in any event not predatory;

2. That the evidence amply supports the Court of Appeals factual findings against petitioner; and

3. That the record is voluminous.

All respondents also attempt to wish away the splits in the circuits created, on a number of points, by the dangerous decision of the Tenth Circuit in this case.

Insofar as respondents attempt to argue that they could have done no wrong because they sold only below their "fully distributed" costs and not below their "direct costs" they merely emphasize the split between the Tenth Circuit's opinion in this case and the opinion of the Eighth Circuit in *National Dairy Products Corp. v. United States,* CCH 1965 Trade Cases, ¶71,541. In the *National Dairy Products* case, brought under the more stringent criminal standard of Section 3 of the Robinson-Patman Act,[1] the Court of Appeals affirmed a criminal conviction

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[1] 49 Stat. 1528 § 3 (1936), 15 U.S.C. § 13a:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of

in which the defendant had sold only below fully distributed cost, saying:

> "... We have no great difficulty in concluding that even though appellant made no sales below *direct cost* ... the question of whether it violated Section 3 by selling below *fully distributed cost* was, in view of all the facts and circumstances, one to be resolved by the jury under proper instructions." (Pp. 81,413-81,414)

And of course the record here shows that respondent Continental in many instances sold below its bare cost of production. (Pl. Ex. 29; see also Tr. 105, 199, 589, 616).

Respondent Carnation argued that "sales below cost are not alone evidence of intent, *National Dairy Products Corp. v. United States,* 1965 Trade Cas. Paragraph 71,541 (8th Cir. 1965)" (Br. 13)

Petitioner does not believe that there is anything in the opinion of the Eighth Circuit in the *National Dairy Products* case (or in the opinion of this court in *United States v. National Dairy Products Corp.,* 372 U.S. 29 (1963)) which would warrant respondent Carnation's interpretation of the *National Dairy Products* case. However, petitioner agrees that the Tenth Circuit has disregarded well-nigh inescapable inferences of respondents'

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a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

intent based upon the undeniable evidence of continuing below-cost selling, planned by respondents Pet and Carnation as much as a year in advance.

It is conceivable that a businessman might innocently sell below cost for a time through inadvertence, or that he might be temporarily forced to a price below his cost by competitive exigencies in his home market. But this record would not have supported such an inference as to any respondent's intent even if the jury had been persuaded to draw it. The evidence shows, indeed, that each respondent reached out many hundreds of miles from its nearest plant to sell at discriminatory prices, intentionally below each respondent's cost, in an area where only petitioner had a plant.

Respondents' conduct is not merely compelling evidence of their intent. It is in and of itself subversive of the purposes of Section 2 of the Clayton Act, reaffirmed in the Robinson-Patman Act, the opinion of the Tenth Circuit holding that it could not reasonably be expected to adversely affect competition cries out for review and repudiation by this Court.

Insofar as respondents attempt to argue that there is evidence in the record which would support the factual conclusions reached by the Court of Appeals, they merely recognize and concede that the Court of Appeals has reexamined the evidence in the light most favorable to respondents, regardless of what the Court may have stated its appropriate scope of review to be.

Indeed, the precedent of this case is the more dangerous because the Court of Appeals has correctly stated its

scope of review and then incorrectly applied it. The result is that despite massive evidence of each respondent's price discriminations, and of the anti-competitive purpose with which those price discriminations were conceived and carried out, the Court of Appeals holds, as a matter of law, that the facts set forth in petitioners' petition are legally inadequate to warrant submission of case to the jury.

As petitioner has pointed out, this holding is tantamount to repeal of Section 2(a) of the Robinson-Patman Act in private cases.

Indeed, petitioners' prediction that this dangerous precedent will create a seriously disruptive anomaly in the antitrust laws has already been demonstrated in the petition for certiorari filed by *Lloyd A. Fry Roofing Co. v. Volasco Products Co.*, Docket No. 464, October term 1965, presently before this Court on petition for a writ of certiorari filed almost simultaneously with the petition in this case.[2] In its petition, Lloyd A. Fry Roofing Co. relies upon the opinion of the Court of Appeals in this case to show that the evidence of its price discriminations could not have *sustained* a jury verdict there.

The *Volasco* case, and this case, thus present an identical question on diametrically opposite decisions of the Sixth and Tenth Circuits. In each case, the plaintiff in the trial court obtained a judgment upon a jury verdict. On very similar facts, the Sixth Circuit held the evi-

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[2]The opinion of the Sixth Circuit is reported in 346 F.2d 661. Compare *Lloyd A. Fry Roofing Co.*, FTC Dkt. No. 7908 (1965) cited by respondent Continental Baking Co. (Br. 8)

dence sufficient to sustain the verdict and judgment, and the Tenth Circuit held the evidence insufficient.

Indeed, this is a stronger case than *Volasco* in several significant respects. In *Volasco*, the defendant was hauling its product 300 miles to sell at low and discriminatory prices in Volasco's home market area. (346 F.2d at 664.) Here, each respondent was hauling frozen pies more than twice that distance to sell them at low and discriminatory prices in Utah Pie's trading area. (Tr. 924, 1105; 61, 97) Thus, the evidence here is even more compelling than in *Volasco*.

In *Volasco*, the apparently equivocal evidence of below-cost selling was testimony of one of *plaintiff's* officers. (346 F.2d 665, 666) Here, below cost selling by each of the respondents is undisputed. And the evidence from the records of respondents Pet and Carnation actually showed that the losses were planned in advance. (Tr. 351, 932; Pl. Ex. 5) Again, the evidence here is stronger than in *Volasco*.

In *Volasco*, the defendant's source of funds to finance its program of discriminatory low pricing was apparently limited to its business in asphalt roofing material, the material for which it was charging discriminatory prices. Here, each respondent marketed a broad line of products unrelated to frozen pies, and showed multi-million dollar profits from its overall business despite its below-cost sales of frozen pies. (Pl. Ex. 31; see also FORTUNE, vol. LXXII, no. 1, July, 1965, pp. 154, 156 showing respondent Pet, the smallest of the respondents, ranking 212 among America's 500 largest industrial cor-

porations, with respondent Carnation ranking 131 and respondent Continental ranking 126).

Here, as in *Volasco*, the case went to the jury both on a conspiracy theory and as a price-discrimination case irrespective of conspiracy. In each case, the jury found a violation of section 2(a) of the Robinson-Patman Act, but no conspiracy. In *Volasco*, there was evidence that there were other competitors besides Volasco Products Co. in the market, but apparently no evidence of market shares, and thus no evidence of the impact of the discrimination on anyone but the plaintiff Volasco. Here, the evidence clearly showed that sales in the Utah Pie trading area were almost exclusively made by petitioner and the three respondents in the relevant period; sales by "others" were *de minimis*. (Pl. Ex. 62, p. 5; D. Ex. PA-27). Again, this case has strong evidence to support the verdict which the Tenth Circuit overturned, where the *Volasco* case, affirmed by the Sixth Circuit, had little or none.

Respondents suggest that the facts of this case are unique and cannot be compared to the facts of any other case. The suggestion is tantamount to abandonment of the rule of law (as well as an acknowledgment that the Tenth Circuit has grossly abused its scope of appellate review by deciding fact questions). There are facts which by themselves suffice to take a case to the jury as a matter of law. Those operative facts, as they appear in the opinion of the Sixth Circuit in *Volasco*, are the discriminatory price itself, some evidence that the price was below cost, and evidence of impact upon the plaintiff. As

petitioner has shown in its petition in this case, there is evidence to support all of the ultimate facts which the Sixth Circuit held sufficient to warrant submission of the *Volasco* case to a jury, as well as important evidence of each respondent's predatory intent apparently *not* present in *Volasco*.

Petitioner believes that the decision of the Sixth Circuit was correct and that of the Tenth Circuit incorrect. However, for the purposes of this petition for certiorari, it is sufficient to note that these two circuit court decisions, on matters of law—as indeed appellate review must be limited to matters of law—are in clear conflict, and the conflict requires resolution by this court.

As for the suggestion that the record in this case is voluminous, suffice it to say that the task of the Court of Appeals would have been very easy if it had simply looked to the record for the evidence to sustain the jury verdict rather than searching the record for evidence to overturn it. Similarly, this court can very readily ascertain the presence of sufficient evidence to support the jury verdict simply by reference to the petition for certiorari in this case. Petitioner believes that the facts stated in the petition are in and of themselves sufficient to support the jury verdict; the jury was not required to, and did not, accept other inferences upon which the respondents and the Court of Appeals relied.

CONCLUSION

For the reasons stated above, and in petitioner's Petition for a Writ of Certiorari, the Petition ought to be granted.

Dated: September 29, 1965.

Respectfully submitted,

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